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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 375

TOMBIGBEE MILL & LUMBER COMPANY, ET AL.,
Petitioners,

vs.

MRS. SARAH HOLLINGSWORTH, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. HOLLOMAN,
T. C. HANNAH,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I

The Tombigbee Mill & Lumber Company and the Western Casualty & Surety Company, by and through their attorneys, pray that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit directing it to send up the record in the above styled and entitled cause to be reviewed by this Court, and such order entered therein as may appear to be meet and proper from the record in this cause.

II

Jurisdiction

The jurisdiction of this Court is invoked and a review sought under the provisions of the statutes, decisions and rules of this Court governing the granting of writs of certiorari.

A. The provisions of Section 240 of the Judicial Code, as amended, Section 347, Title 28, U. S. C. A.

B. The provisions of Rule 38 of this Court, and particularly paragraph 5 (b), as follows:

(1) That the Circuit Court of Appeals for the Fifth Circuit has rendered a decision in the case at bar which is in direct conflict with the decision of the Circuit Courts of Appeals of the Sixth, Eighth, and Tenth Circuits involving the same or exactly similar questions.

(2) That the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law (that is a question of common law), in conflict with the applicable local decisions (that is, the decisions of the Mississippi Supreme Court); all in violation of the principles decided in Erie *v.* Tompkins, 304 U. S. 64; 82 L. Ed. 1188.

(3) That the Circuit Court of Appeals for the Fifth Circuit in deciding the case at bar has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Federal Court as to call for an exercise of this Court's power of supervision, in these particulars, to-wit:

(a) The trial Judge who charged the jury that, "If in your judgment negligence which proximately contributed to the injury in this case has been proven, you may then, in the absence of proof to the contrary, indulge the presumption that Mr. Hollingsworth was at the time of his injury engaged in his master's business and was exercising reasonable care for his own safety"; which said instruction is in direct conflict with the decisions of the Supreme Court of the State of Mississippi; and is likewise in direct conflict with the decisions of the Circuit Courts of Appeal in other districts; and in direct conflict with the decisions of the Supreme Court of the United States.

(b) The Circuit Court of Appeals for the Fifth Circuit, in deciding the case at bar, approved the

action of the trial Court in submitting this case to the jury when there was no question of fact to be submitted to the jury; which action by the said trial Court is in conflict with the decisions of the Honorable Supreme Court of the United States, and likewise in conflict with the decisions of the Supreme Court of the State of Mississippi.

III

Case History

We will give a condensed history of this case with a view of presenting fairly and impartially the facts and/or points wherein the trial Court, as well as the Appellate Court erred:

Bill Hollingsworth, the husband of Mrs. Sarah Hollingsworth, and the father of Sue Hollingsworth, was an employee of the Tombigbee Mill and Lumber Company and met his death on January 22, 1946 by the cuff on the bottom of the leg of his overalls getting caught in a set screw on a revolving shaft.

There were no eye witnesses to this accident and it is purely a matter of speculation, guess and/or conjecture as to how and why and when this accident occurred.

It is reasonably certain from the evidence that the accident occurred some where around 9:00 to 9:30 o'clock in the morning.

The Appellees filed their suit in the United States District Court for the Northern District of Mississippi, alleging that the deceased lost his life in and about the performance of duties that were assigned by the master; and the master denied that the deceased was in the performance of any duties assigned to him at the time of his death.

The case proceeded to trial on this clean cut issue and at the conclusion of the testimony for the Appellees and also at the conclusion of the testimony for the Appellant, there

was a complete absence of positive proof (1) to show that the deceased was performing any duties at the time of his death as directed by the master, (2) to show how and why the deceased came in contact with the revolving shaft.

Notwithstanding these facts, the trial Court sent the case to the jury; and sent the case to the jury under wholly erroneous instructions. The jury returned a verdict for $20,000.00, and the case was affirmed by the Circuit Court of Appeals.

The set screw that caught the cuff of the overalls of deceased was some 42 inches above the ground, near an oil cup, and within a few inches of a six by eight inch timber. While there is no proof in the record of this fact, it seems obvious that the deceased was on this piece of timber, but for what purpose is not known. It is the theory of Appellees that the deceased was there to put oil in this cup; whereas, it is the theory of Appellants that he was there because he was going to or returning from the boiler room, where he had been directed by his foreman to go to dry and warm his feet.

Summarized and condensed, here is the evidence supporting these theories: One witness testified that some time about an hour or an hour and a half before the tragedy, that the Superintendent, J. E. Bishop, told the deceased to "go down and oil the machine this morning", and that Mr. Hollingsworth replied, "I don't want to go down there, I feel like something is going to happen"; and that Mr. Bishop told him, "Go ahead, I will get somebody else after today."

This testimony was not only contradicted by witnesses and circumstances; but we submit that it was wholly insufficient to carry the case to the jury or sustain a verdict, for several reasons: (1) This testimony does not identify any "machine"—and the proof in the record shows that there were more than 80 oil boxes in this sawmill plant.

(2) The engine and other machinery was on the ground floor and the sawmill and planing mill were on the floor above; and the guess, or conjecture that this alleged instruction applied to the oil box which it is alleged the deceased was oiling is negatived by the fact that another man was on the job oiling this particular box on this particular day. This is an uncontradicted fact. (3) The witness fixes the time as about eight o'clock when this instruction is alleged to have been given—and the record clearly and uncontradictedly accounts for the deceased's whereabouts for the next hour, during all of which he was working under and was subject to the orders and directions of another foreman. (4) This foreman under whom the deceased was working immediately prior to his death swore positively that deceased had no duties whatever to perform at or near the place where he was killed. (5) This foreman swore that only some fifteen minutes before this tragedy, (and the very last instructions given the deceased), that he told said deceased to go to the boiler room and dry and warm his feet. (6) That only the day before this accident deceased came from the boiler room walking on the very timber he is supposed to have been walking on when killed, and that said foreman warned the deceased against walking thereon. (7) That deceased had been warned and instructed never to oil the machinery while it was in motion, and that, if deceased wanted to oil the machinery he could have stopped said machinery.

Here is a more potent and absolutely conclusive reason why the testimony about Bishop telling the deceased to oil the machine is of no probative value whatever: said instructions were given to the deceased about eight o'clock, according to the witness, and he was killed somewhere around nine or nine thirty. There is nothing in the record to show whether or not the deceased had ever oiled any machine prior to the time of his death, but there is uncontradicted

and therefore conclusive proof in the record that at the time Hollingsworth was killed, and for at least a half hour prior thereto, he was not subject to the orders and directions of Bishop, but was subject to the orders and direction of Dodson, the mill foreman. The very last instructions that were given to the deceased prior to his death were given by Dodson and in the presence of Bishop, and these instructions were, to "go to the boiler room and dry and warm your feet", and this testimony is likewise uncontradicted and therefore conclusive that at the time Hollingsworth met his death he had no duties whatever to perform for his master at any point near where he was killed.

To summarize: there was not a word of positive testimony to support the contention of Appellees that the deceased was ever ordered or directed by the master to perform any duties at the place where he met his death, nor was there any positive testimony of any kind to show that deceased was performing any duty for the master at said time and place; but there was only the weakest of guess, speculation or conjecture. In support of the theory of Appellant there was clear, positive and uncontradicted testimony by the immediate foreman of the deceased that the said deceased had no duties whatever to perform for the master at the time and place where he met his death.

The decisions of the trial Court and the Circuit Court of Appeals are therefore in direct conflict with the decisions of the Supreme Court of the State of Mississippi and with the Circuit Courts of Appeals for other districts and of the Supreme Court of the United States.

Respectfully submitted.

JOHN H. HOLLOMAN,
T. C. HANNAH,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The testimony offered for Appellees, viewed in its most favorable aspects, rises no higher than guess, speculation or conjecture. One must guess as to "what machine" was meant by the instruction; and, guess as to whether the deceased was there for oiling this machine or on his way to, or from the boiler room; and guess as to why deceased would try to oil when the machinery was in motion when he had been instructed not to do so; and finally, even if he was oiling, why he brought his trousers leg in contact with this set screw.

The holding of the Court in the case at bar is in direct conflict with the holding in the case of—

Westland Oil Company v. *Firestone Tire & Rubber Co.* (Eighth Circuit) 143 Fed. (2) 326.

> "As the proof rests upon circumstances, these circumstances must do more than bring plaintiff's theories within the realm of possibilities."

Citing

Franklin v. *Skelly Oil Company* (Tenth Circuit) 141 Fed. (2) 568;

Epperson v. *Midwest Refining Company* (Eighth Circuit) 22 Fed. (2) 622.

Likewise the holding in the case at bar is in direct conflict with the holding of this Court in *Chicago, M. & St. P. Railroad Co.* v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041, wherein the Court said:

> "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As

there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *United States* v. *Ross*, 92 U. S. 281, 284, 23 L. Ed. 707, 708; *Manning* v. *John Hancock Mut. L. Ins. Co.*, 100 U. S. 693, 698, 25 L. Ed. 761, 763."

The most that can be said of the testimony for Appellees, is that it presented a theory in conflict with the theory of Appellants; and the holdings of the trial Court and the Court of Appeals are in direct conflict with the holdings of the Circuit Courts of Appeals for the Eighth and Sixth Circuits.

In *Westland Oil Co.* v. *Firestone, supra*, the Court said:

"To submit to the jury a choice between probabilities is to permit them to conjecture or guess, and where evidence is clearly circumstantial with two opposing hypotheses, it is without probative force and tends to support neither." (Citing *Parker* v. *Gulf Refining Company* (Sixth Circuit) 80 Fed. (2) 795; *DuPont* v. *Baridon*, 73 Fed. (2) 26.)

And in *Parker* v. *Gulf Refining Company* (Sixth Circuit), 80 Fed. (2) 795, the Court says:

"To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial. This has been repeatedly pointed out by this Court. *Davlin* v. *Henry Ford & Son* (C. C. A.) 20 F. (2) 317; *Louisville, etc. R. Co.* v. *Bell* (C. C. A.) 206 F. 395; *Toledo, etc. Ry. Co.* v. *Howe* (C. C. A.) 191 F. 776, 782; *Virginia & S. W. R. Co.* v. *Hawk* (C. C. A.) 160 F. 348, 352. The opinion of the expert that the accident occurred as the result of bumping is supported by nothing more than that bumping does frequently occur with most liquids when they are superheated,

and the circumstance that wax was found two months after the accident at a spot upon the kitchen floor remote from the stove. To connect the latter with the accident, there must first arise a reasonable inference that the wax was thrown from the pan at the time it occurred. This superposing of inferences does not constitute substantial evidence. *Pennsylvania R. Co.* v. *Chamberlain, Adm'x.*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819."

In this case of *Pennsylvania R. Co.* v. *Chamberlain*, the Court said:

"It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the *facts*. The witnesses for petitioner flatly testified that there was no collision between the nine-car and the two-car strings. Bainbridge did not say there was such a collision. What he said was that he heard a "loud crash," which did not cause him at once to turn, but that shortly thereafter he did turn and saw the two strings of cars moving together with the deceased no longer in sight; that there was nothing unusual about the crash of cars—it happened every day; that there was nothing about this crash to attract his attention except that it was extra loud; that he paid no attention to it; that it was not sufficient to attract his attention. The record shows that there was a continuous movement of cars over and down the "hump", which were distributed among a large number of branch tracks within the yard, and that any two strings of these cars moving upon the same track might have come together and caused the crash which Bainbridge heard. There is no direct evidence that *in fact* the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing.

> At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it.
>
> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

The above statement is supported by the citation of a wealth of authorities.

The trial Court and the Court of Appeals decided the case at bar in direct conflict with the uniform holdings of the Mississippi Supreme Court—

> In *Berryhill* v. *Nichols*, 158 So. 470, 171 Miss. 679, the Mississippi Court said: "It is essential as an element of liability under our wrongful death statute (Code 1930, Section 510) that the negligence complained of shall be the proximate cause, or at least a directly contributing cause, of the death which is the subject of the suit. The negligence, and not something else, must have been the cause which produced or directly contributed to the death. Hamel *v.* Southern Ry. Co., 113 Miss. 344, 358, 74 So. 276. And, as in other cases, this essential element must be proved as a reasonable probability. To prove no more than that it was a possibility is not a sufficient foundation for the support of a verdict or judgment."

This doctrine has been reannounced and approved by our Court in the following cases:

> *Columbus & Greenville Railroad Company* v. *Coleman*, 160 So. 277, 172 Miss. 514;

Yazoo & M. R. Company v. *Lamensdorf,* 177 So. 50, 180 Miss. 426. Suggestion of Error, 178 So. 80;
Teche Lines v. *Bounds,* 179 So. 747, 182 Miss. 638;
Mutual Benefit Health & Accident Association v. *Johnson,* 186 So. 297;
Kramer Service v. *Wilkins,* 186 So. 625, 184 Miss. 483;
Anderson Clayton Company v. *Rayburn,* 192 So. 28;
Sanders v. *Smith,* 27 So. (2) 889.

The trial Court and Court of Appeals have therefore decided the case at bar in direct conflict with the holding of this Court in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

On this record of nothing except guess, speculation or conjecture to support the theory of Appellees as to why and how the deceased came in contact with this revolving set screw, and also positive and uncontradicted testimony on behalf of the Appellants that the deceased had no duties whatever to perform at that point for the master, the trial judge instructed the jury "If in your judgment negligence which proximately contributed to the injury in this case has been proven, you may then, in the absence of proof to the contrary, indulge the presumption that Mr. Hollingsworth was at the time of his injury engaged in his master's business and was exercising reasonable care for his own safety." Timely objections were made and exceptions taken.

It is respectfully submitted that the trial Court erred in giving this instruction, and that the Court of Appeals erred in approving the action of the trial Court. This course of proceedings has been condemned both by the Supreme Court of the State of Mississippi and by the Supreme Court of the United States.

In *Bridges* v. *State,* 197 Miss. 527, 19 So. (2) 738, the Court said:

> "When the entire case is before the jury, there is no need *nor right* to charge them upon a presumption." (Italics ours.)

To the same effect are the cases of—

N. O. & G. N. Railroad Company v. *Waldon,* 160 Miss. 102, 133 So. 241;
Natchez Coca Cola Bottling Company v. *Watson,* 160 Miss. 173, 133 So. 677.

In *Quock Ting* v. *U. S.,* 140 U. S. 417, 35 L. Ed. 501, Mr. Justice Field speaking for the Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the Court."

This same principle has been approved by the Mississippi Supreme Court in the case of—

Board of Miss. Levee Com'rs. v. *Montgomery,* 145 Miss. 578, 110 So. 845, and
Carrere v. *Johnson,* 149 Miss. 105, 115 So. 196.

In the case at bar, the deceased was at the time of his death subject directly and only to the orders of Dodson, and the testimony of Dodson stands uncontradicted that the deceased had no duties whatever to perform for the master in and around the place where he met his death.

In the very recent case of the Mississippi Supreme Court of *Sanders* v. *Smith,* 27 So. (2) 889, this Court said:

> "But death alone is insufficient to establish both its cause and an inference of negligence therefrom."

In the case of *Westland Oil Company* v. *Firestone Tire & Rubber Company,* 143 Fed. (2) 326, the Eighth Circuit Court of Appeals said:

> "As the proof rests upon circumstances, these circumstances must do more than bring plaintiff's theories within the realm of possibilities."

In *Mobile & Ohio R. Company* v. *Clay*, 156 Miss. 463, 125 So. 819, the Mississippi Supreme Court said:

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. See *Manning* v. *Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761."

It follows that the above instructions by the trial Court is violative of the law long since announced by the Honorable Supreme Court of the United States and by the Supreme Court of the State of Mississippi.

We therefore respectfully submit that an examination of the record in htis case will clearly reveal:

First, that the decision in case at bar, by the trial Court and by the Appellate Court is in direct conflict with the holdings of the Circuit Courts of Appeal for the Sixth Circuit, the Eighth Circuit and the Tenth Circuit, on the identical question involved in the case at bar.

Second, that the holdings of the trial Court and of the Circuit Court of Appeals in the case at bar are in direct and hopeless conflict with the decisions of the Mississippi Supreme Court, the decision of other Circuit Courts of Appeal and the decisions of the United States Supreme Court.

Third, that the holding of the trial Court and the Appellate Court in the case at bar with reference to the instructions given by the trial Court are in direct and hopeless conflict with the decisions of the Mississippi Supreme Court, the Circuit Courts of Appeal of the other districts, and of the decisions of the United States Supreme Court.

Fourth, that the holdings of the trial Court and of the Appellate Court in submitting this case to the jury are in direct conflict with the holdings of the Mississippi Supreme Court, the Circuit Courts of Appeal of other districts and of the United States Supreme Court.

WHEREFORE, it is respectfully submitted that the record in this case should be considered by the Honorable Supreme Court of the United States and should be reversed with proper directions.

Respectfully submitted,

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JAS. A. CUNNINGHAM,
Attorney for the Hollingsworths in Opposition to Writ of Certiorari.

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BRIEF OF THE LAW AND THE FACTS.

1. We have been afforded no copy of printed brief by counsel for petitioner but shall present this reply brief opposing petitioners request for writ of certiorari.

Learned counsel's case history is full of errors and assumes, to start with, that the trial court and the jury should adopt any and all statements made by witnesses

for the petitioners in the court below as being conclusive proof and that they should hold the statements of witnesses for the defendants as of no value whatever but the trial court and the jury and the Circuit Court of Appeals did not so consider the statements of petitioner's employees, and witnesses offered by the Hollingsworths.

The trial court had a right to submit the issues raised by the witnesses for the petitioner and the witnesses for the Hollingsworths and to let the jury determine the weight of the evidence on the issues involved. This is nothing new and is too simple a matter to bother this court about, and the Circuit Court of Appeals found no error.

Learned counsel states under paragraph III of his brief that Bill Hollingsworth was an employee of the petitioner, Tombigbee Mill and Lumber Company, and "met his death on January 22, 1946 by the cuff on the bottom of the leg of his overalls getting caught in the setscrew on a revolving shaft", and that there were no eye witnesses to this accident, and the brief states that it is a matter of speculation, guess or conjecture as to how and why and when this accident occurred.

True, nobody saw it but the proof shows and the brief admits that he was an employee and had been ordered by the superintendent to oil the machinery that day which he undertook to avoid but the superintendent ordered him to go ahead that day and he would get another man to do the oiling the next day.

The general relationship of master and servant on that occasion having been established without any controversy, the common law of Mississippi presumes that the servant at the time of the accident was engaged in the scope of his employment and in furtherance of the master's business which presumption is not based on any other presumption as learned counsel contends but on the conceded facts from his general employment.

Merchants Company v. Tracy, 166 So. 340, 175 Miss. 49, from which we quote the following:

> "Where the general relationship of master and servant is shown a rebuttable presumption is raised that the servant at the time of the accident was engaged in the scope of his employment and in the furtherance of the business of the master. Barmore v. Vicksburg, S. & P. R. Co., 85 Miss. 426, 38 So. 210, 70 L. R. A. 627, 3 Ann. Cas. 594; Slaughter v. Holsomback, supra, and Southern Bell Telephone & Telegraph Co. v. Quick, supra."

This common law doctrine is further shown by the opinion of the United States Supreme Court in *Tennant v. Peoria and P. U. Railway Company*, 321 United States, 29; 64 Supreme Court Reporter 409, from which we quote the following:

> "The court below erred, however, in holding that there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was the proximate cause of Tennant's death. The absence of eye witness was not decisive. That there was testimony that his duties included staying near the north or rear end of the engine as it made

its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. Looney vs. Metropolitan R. Co., 200 U. S. 480, 488, 26 S. Ct. 303, 306, 50 L. Ed. 564; Atchison, Topeka & Santa Fe R. Co. vs. Toops, supra, 281 U. S. 356, 50 S. Ct. 283, 74 L. Ed. 806; New Aetna Portland Cement Co. v. Hatt, 6 Circ., 231 F. 611, 617. In addition, the evidence relating to the rule and custom of ringing a bell 'when an engine is about to move' warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.' "

The proof strongly tends to show that the master was negligent in two matters:

1. In allowing the six by eight that employees walked out on to oil the two south bearings to become oily and slick and covered with sawdust constituting a dangerous place for the employees to work;

2. In allowing this broken cuff which would have protected the employees from the hazard of this revolv-

ing setscrew to be and remain in a dangerous condition for a number of years, and which caught this man's pant leg and wound him around the revolving shaft and beat him to death against the ground.

The circumstances and the reasonable deductions to be drawn from the circumstances afforded the jury ample evidence to find that he was engaged about the master's business when he was injured and killed. He had been ordered by the superintendent to oil the machinery that day (Tr. 131-143 inclusive), and the superintendent at the same time required Hollingsworth to do it over his protest and promised "that he would get somebody else after today". And the same proof shows that he picked up his oil can and went downstairs as he had been ordered to do. His clothes were caught by this revolving setscrew and broken cuff at the very place he would go to oil these bearings. This broken cuff being close-up to where he would walk to perform his duty of cleaning out the oil cuff, if necessary, (which frequently had to be done, and to oil the bearing, (Tr. 171 and 252), and the oil can was found laying by his side (Tr. 140 and 295). The case of *Tennant v. Peoria and P. U. Railway Company* cited above also holds that in case of a death where the decedent is unable to explain that the law affords him a presumption that he is in the exercise of due care. This is not a presumption based on the *fact of his death* which is proven by everybody who testified.

Learned counsel bases his main complaint on the fact that the trial court and the Circuit Court of Appeals re-

cognized these presumptions and dealt with them as rebuttal presumptions. Learned counsel is altogether in error about either one of these presumptions being based upon a presumption. Each of them were based *upon the facts* recognized by the common law as giving rise to the presumptions referred to above in this brief.

It is insisted by counsel for petitioner that the testimony of Mr. Bishop, the superintendent, who stated that he did not allow any employee to oil the machinery while the machinery was running is contradicted in many ways.

In the first place, it does not show that the machinery was ever stopped for anybody to oil the machinery at any time. In the next place, it is shown by substantial proof that it was a general custom in this plant to oil the machinery when it was in operation and that this had gone on for years and that no objection had ever been made to it. On the contrary it is shown by the witness, Noel Shook, that he had been one of the active upper men in that operation since it started some three years ago, that he worked as a millwright downstairs where this accident happened for a year and a half and then became a sawyer and worked close by up to the time of the accident, (Tr. 37.);

Also, (Tr. 36 to 63) that he had never heard of any rules as to how or when oiling should be done but testified that he did much oiling himself and that other employees did oiling at all hours and when the machinery was in operation and that there was no reason why a superintendent should not have known all about it;

Also, the witness, Lat Watkins, (Tr. 71 to 83 inclusive) testified that he did all day oiling there, that they oiled the machinery while it was running and kept somebody busy all the time, that Mr. Bishop, the superintendent, was around while it was going on and nothing to keep him from seeing it and stated further that it had been done under the superintendent's *very observation* (Tr. 73) and that he never knew him to make an objection to it and that it was the custom obtaining in the mill;

To the same effect was the testimony of Mr. Harris (Tr. 32 to 36 inclusive).

Under the common law rule announced by the Supreme Court of Mississippi when petitioner allowed this to become a custom it then and there became the company's approved working method.

Stricklin v. Harvey, 179 So. 345, 181 Miss. 607, from which we quote the following:

> "In the Wilbe Case the court also upheld and reaffirmed the principle that even though another was provided, such as furnishing the boat in the present case, if it was the habit and custom, known to the employer, for the servant to use another way or route of passage, and the employer acquiesces in such custom, it would not constitute negligence on the part of the servant to use the way or route commonly used, in the usual and customary manner."

Hardy v. Turner-Farber-Love Company, 101 So. 489, 136 Miss. 355 from which we quote the following:

> "We think the testimony is conflicting as to whether the employer had furnished the servant a safe place to work, and the question should have been submitted to the jury, for the reason that, while the testimony of the witnesses for the appellee showed that the deceased was warned of the danger of oiling from within the compartment, and was instructed to use the safe way between the swayer and the wall, yet the proof offered by appellant, and the reasonable inferences to be drawn therefrom, in favor of the plaintiff, against whom a peremptory instruction was granted, disclose that the deceased was permitted to use the dangerous way daily for many years, and that this method alone had been used by him, with the knowledge and long acquiescence of the employer, so as to become a custom; and therefore, viewing the place of work as a whole, where either one of the two ways of oiling the pulleys could be used by the servant, and he habitually, with the knowledge and approval of the master, used the dangerous one and was injured thereby, the employer was negligent in furnishing an unsafe place to work. Contributory negligence of the servant would only go to diminish damages, and the assumption of risk is abolished, except as to the ordinary hazards of the employment; and a recovery is maintainable if the employer is guilty of the negligence charged."

2. The superintendent of the plant and Mr. Dodson, the superintendent downstairs, undertook to show and did show that they had called in several laborers to dip some water out of a hole which was nobody's regular job and which was a mere diversion from the ordinary work to

clear up a slight emergency. They testified that in response to some orders claimed to have been made by Mr. Dodson that the decedent went off toward the boiler room as if to warm his feet but that he had not been seen again in fifteen or twenty minutes, and about thirty minutes (testimony of John Trull Tr. 239).

It is shown that this emergency work went on for about thirty minutes (Tr. 226-227) where the witness Albert Steward testified that the went out of the basement ahead of Mr. Hollingsworth and that when he got up to the dry kiln where Hollingsworth was accustomed to work that Chapman had not finished loading the truck. Mind you this was after the dipping of the water and was after superintendent, Bishop and Dodson, claimed that he went off as if to go to the furnace and dry his feet. And that Mr. Chapman finished loading the truck after this dipping of the water was done. The jury had a right to draw the conclusion from the evidencee that Mr. Chapman was ordered to oil the machinery that day after he had gotten through dipping this water and relieving this temporary emergency.

All this time was estimated and a mere estimate of witnesses ranging from fifteen minutes to thirty minutes up to the time he was injured and killed. It was definitely known when he got on the shaft Shook's Testimony (Tr. 38) where the sawyer felt the roller-bed stop rolling and it was then that it was discovered by a colored boy that the man was wrapped around the deadly shaft. And it was shown by the testimony of Mr. Chapman that he had

loaded his truck before Mr. Bishop came and ordered Hollingsworth to oil that day; Therefore, it was reasonable for the jury to conclude that after Chapman got through dipping water that he went back to the lumbershed where he was accustomed to grading lumber for it was there that Mr. Bishop ordered him to go down and oil that day. Mr. Chapman testified that this order of Bishop was somewhere between eight and nine o'clock. He could not give the exact time except by mere estimate, but whether it was before or after makes no difference for the order was given and the man was killed on the job.

Mr. Bishop was contradicted flatly on the question of not allowing the machinery oiled while in motion for it was shown by several witnesses that it had been a custom ever since the mill had started three years back for at least one regular oiler to oil at all times when the machinery was in motion and out of motion and this was well known to Bishop yet learned counsel claims that Bishop's testimony should have been accepted as conclusive by the trial judge and by the jury and the Circuit Court of Appeals, all of whom disagreed with him. Mr. Dodson's testimony was also flatly contradicted by Mrs. Sarah Hollingsworth (Tr. 327, and by Mrs. Potter, Tr. 330), yet learned counsel holds that the trial court and the jury and the Circuit Court of Appeals should have ignored these contradictions and should have accepted Mr. Dodson's statements as infallible.

THE CASE AS MADE BY THE EVIDENCE.

There is no controversy that plaintiff's decedent, William Hollingsworth, was employed by the appellant, Tombigbee Mill & Lumber Company, and the day and hour of his injury (Bishop Tr. 204). It is insisted upon by the appellee and conceded by the appellant.

That it was plaintiff's duty to oil the bearings that day, plaintiff proved by the following facts and circumstances: It was shown positively by the witness, J. W. Chapman, (Tr. 131) that J. E. Bishop, Superintendent of appellant's mill, approached Hollingsworth in his presence on the morning of his injury and death and ordered him to go down and oil the machinery, that Hollingsworth protested that he did not want to go down there (Tr. 131-143) that he felt like something was going to happen but that Mr. Bishop ordered him to go ahead, "That he would get somebody else after today."

This testimony was to some extent corroborated by the fact that Mr. Bishop admitted (Tr. 205) that he made it a practice of laying out the work when there were any changes for employees every morning as they came in about the plant, and also, that he had directed Hollingsworth on that particular morning (Tr. 206) what to do but denied that he ordered him to do oiling. But ordered him to go downstairs and work that day. This testimony was again corroborated by the testimony of Chapman (Tr. 141) that Hollingsworth got his oil can (Tr. 141) and went on to the downstairs where he met his death (this was not contradicted by anybody).

Mr. Chapman is again corroborated that this man was doing oiling because the uncontradicted proof that the oil can lay upon the ground where the man was caught by the broken collar and protruding set-screw and wound around the revolving shaft (Tr. 140-295). This fact is not denied by any witness.

He is again corroborated by the uncontradicted proof in this record (Tr. 276-301) that he was a very careful and painstaking employee.

True, when he first got downstairs where Mr. Bishop sent him, the downstairs man, Mr. Dodson, told him and some other employees to dip some water up that had accumulated and was causing sawdust to clog the chain but some fifteen or twenty minutes prior to the time he was injured and killed Mr. Dodson informed him that this job of dipping water was done (Tr. 290).

He is again corroborated by the presumptions of the law. Mr. Hollingsworth was dead and could not speak for himself and nobody saw him at and about the time he was injured and killed and so the presumption of the law is that he was engaged in the master's business and in the exercise of ordinary care to take care of his life, as is shown by the evidence and nowhere denied that he was in the employment of appellant at the time. *Tennant v. Peoria & P. U. Railroad Co.*, 321 U. S. 411; *Merchants Co. v. Tracy*, 166 So. 340, 175 Miss. 49.

It was a custom to oil this machinery when the machine was running and not running and indiscriminately.

Harris, (Tr. 33) said:

> Q. "What were they doing, did they oil it when it was and when it was not running?
> A. "Yes, sir."

On cross-examination (Tr. 35):

> Q. "And you saw them oiling sometimes when it was running?
> A. "Yes, sir."

He couldn't say about instructions whatever (Tr. 34).

The witness, Noel Shook, testified, that he worked on this ground floor as a millwright and engineer for about a year and a half, that he had never heard of any rules connected with the oiling of this machinery (Tr. 37).

> Q. "Was it a custom there to oil when it was running and when it was not running owing to when it needed oiling?
> A. "Just when necessary and if it was necessary to oil it when it was running we did it."

Again (Tr. 41):

> Q. "Mr. Shook, in oiling how can you oil these bearings with the machinery running? What is the practical way to oil it and what did you find to be safe?
> A. "Well, I oiled it from two places, sir.
> Q. "Tell the jury where these two places are.
> A. "I stood here (indicating) and oiled on it sir and I got up on top of this framework and oiled it.
> Q. "You mean by that you have stood on the ground and reached over this shaft and oiled these bearings reaching over those two (meaning the north two) and these two (meaning the south two)."

The witness, Matt Watkins, testified (Tr. 71) in response to question about whether or not there were any rules, said that there were no rules whatever about when and how the oiling should be done. He said:

> "No, sir, we just oil up and got things going and if we found a hotbox we put oil on it."

He was a regular oiler and testified:

> "How much time did you put in on that oiling every day?
>
> A. "Oh, I just kept the engine running and I had a couple of negroes oiling and help watching for hotboxes and helped them out on that.
>
> Q. "In going through and watching for hotboxes and oiling them did you do that when the engine was running?
>
> A. "Yes, sir.
>
> Q. "Did the oilers do that?
>
> A. "Yes, sir, they went through all times of day."

He testified (Tr. 78) that Mr. Bishop ordered him to do oiling and that he put most of his time in oiling, that he helped the negroes oil generally, that the negroes sometimes oiled these bearings where this man got killed and that he sometimes oiled them.

All the time this man worked there as an oiler nobody ever gave him instructions about it and never heard of anybody else instructing the darkies about it, and they would oil as much as three times a day and when boxes got hot he would oil them, and no one ever advised them against oiling when the machinery was running.

The witness, James Smith, colored, a very willing witness for appellant was put on the witness stand by the appellant, during the course of his testimony testified in part as follows (Tr. 252-253):

> Q. "So when you would be engaged in something else somebody would be called on to do the oiling?
> A. "Yes, sir.
> Q. "That's right, is it not?
> A. "Yes, sir.
> Q. "And now you know every time you have a hotbox you can't stop but you have to go around carefully and clean it out and put oil in it?
> A. "Yes, sir.
> Q. "You are not the kind of oiler who would have to stop the machinery when you found a hotbox are you?
> A. "No, I don't stop every time.
> Q. "That wasn't the custom anyway was it?
> A. "No, sir."

He showed clearly that there were no rules formulated or promulgated with reference to the question of oiling (Tr. 258), and that it was a custom to oil when the machinery was running.

> Q. "They let you do that oiling and use your own judgment, didn't they?
> A. "They let you do as you please.
> Q. "They didn't tell you how to do it, just use your judgment?
> A. "That's right. I had oiling experience before I came here.
> Q. "When you go through there at seven o'clock and do your work and after that they have somebody else that does it.

A. "I goes on with my other job.
Q. "And somebody else does the oiling?
A. "Yes, sir.
Q. "And that depends on whoever they can get to do that to keep from stopping. If you are busy they get somebody else, is that right?
A. "Yes, sir.
Q. "You are one of these darkies that don't have to have rules and regulations.
A. "I never did hear of any.
Q. "How do you figure that?
A. "I mean directions and rules to show you how to do you job, you didn't need any, did you?
A. "No, sir, not about oiling.
Q. "You never heard of any rules did you?
A. "No, sir."

He stated (Tr. 256) at the time Dee Mason was doing some oiling would he have any other job or duties or not.

A. "You mean Dee Mason?
Q. "Yes, sir.
A. "He didn't have any other job when he was oiling."

The witness testified (Tr. 264) while talking about oiling this machinery while running where Mr. Hollingsworth was killed (Tr. 263), and when asked what he did with that big belt and that big shaft and that big wheel and pulley, and whether he went over them or under them, he answered:

A. "No, sir, I didn't get up to them. I would come here (indicating) if it was running. I would walk on down here and oil here (indicating) I would climb under this six by six timber and I would stoop down

and come under here (indicating) I would take my left hand and pour the oil in there. I could reach up back around this box and oil this here and wasn't in the way of any belts in any place.

Q. "You have experienced that, have you?
A. "Yes, sir.
Q. "Up here close things didn't catch you?
A. "No.
Q. "You have tried it and know it can be done.
A. "Yes, sir.

A. "I know it can be done and he went on to say and explain how it would be safe to do it when the machinery was running."

True, this witness Chapman was contradicted on some immaterial matters and was directly contradicted by Mr. Bishop, the Superintendent, but also, Mr. Bishop, the Superintendent, was contradicted flatly about other phases of the issue. He testified positively that it was not any duty of plaintiff's decedent to oil that day for the reason that he had a regular oiler and that Hollingsworth's services in that regard were not at all needed and he named James Smith as the all-time oiler. (Tr. 198.) It turned out that James Smith was also the all-time trimmer man and it turned out that a darkey named Dee Mason had been an all-time oiler and that he was off and sick that day (Tr. 261). James Smith's testimony (Tr. 261-264-265-266) and other witnesses testified to the same effect and this fact was not denied by anybody.

It is shown that they kept all-time oilers required to oil boxes every time they found them warm or hot and they were always required to go around and oil a box

where they found it hot and that was the established rule (Tr. 251) and this was all left to the judgment of the oiler. It is also shown that they only stopped the mill occasionally. Bishop (Tr. 200).

In all appellant's efforts of defense the record shows they were never able to prove they stopped the machinery to oil the hotboxes.

The superintendent, Bishop, undertook to avoid liability by stating that his oiler, Smith, did all the oiling at intervals when the mill would stop and his darkey, Smith, on his direct examination undertook to corroborate his superintendent but wholly fell down and admitted that the operation required all-time oilers and that Dee Mason, the regular oiler, who did nothing but oil machinery during the day was sick that day and the appellant made no showing as to who was doing the oiling that day if it was not done by Hollingsworth.

Also, the witness, Watkins (Tr. 71-72) showed that it required all-time oilers and that he was a long experienced oiler.

The witness, Shook who had worked in this mill since it was established testified positively that it was a fixed custom for oilers to oil the machinery when it was running the same as when it was not running but all that depended upon which hotboxes would get warm in the mill and this was all left to the judgment of the oiler, whose duty it was to keep down hotboxes (Tr. 37).

It is shown by the overwhelming proof that it was the long continued practice of appellant's employees to oil these boxes when the machinery was running as well as when it was not running and the employees got no orders or directions regarding the same and the jury had a right because of this long universal practice to determine that the master could not escape knowledge or that at least the master was chargeable with knowledge of this practice. Particularly in the light of the statement of Mr. Bishop, the Superintendent, (Tr. 219) as follows:

> Q. "You were there nearly all the time?
> A. "I am there from early morning to night. I am right down in that sawmill all the time. I look after the whole operation.
> Q. "Do you pass around that oiling business?
> A. "Three or four times a day.
> Q. "If it was done as a custom you would see it, would you not?
> A. "Yes, sir.
> Q. "And know about it?
> A. "He refused to answer."

Also, testimony of James Smith (Tr. 257). Also testimony of Lat Watkins (Tr. 73).

The statement of another foreman, O. F. Dodson (Tr. 300) that the system of oiling was established when he went there and when asked if he tried to change the system, his answer was, "Well, I would check it."

THERE WAS NO SAFE WAY PROVIDED WITH THE PRESENCE OF THE BROKEN COLLAR TO OIL THIS MACHINERY WHILE THE MACHINERY WAS IN MOTION.

It was shown by the proof that the master was negligent in exercising care to provide oilers a reasonably safe place in which to work and particularly at this place on this framework with this gap out of each side which was a grab hook for anything that came in touch with it. In the first place, it is shown by the witness, H. L. Hathcock, whose testimony is uncontradicted that he examined all these bearings, all of the revolving shafts, which was permitted by the court, and that at the places where employees were required to go and oil the bearings and that only about one-third of these revolving set-screws were protected and at least two-thirds of them were not protected but protruded (Tr. 323) and that this was a place where employees were required to go to oil bearings; and the uncontradicted testimony of L. Watkins shows the same (Tr. 80 and 85).

The appellees offered a number of witnesses to show that there was no reasonably safe way to oil the particular bearing where plaintiff's decedent got killed except that you mount this frame-work and walk the six by eight along the frame-work and reach over to do the work. It is shown that the work of oiling did not only involve the pouring of the oil but frequently involved the cleaning out of these cups so the oil would go into the bearing and stop the hotboxes (Tr. 171 and 252). That in oiling the East bearing on the south side of the frame-work upon which these shafts rested, it is obvious one had either to reach over or step over this defective cuff and that it endangered the oiler in that it exposed him to the risk of getting his pants leg caught in this revolving cuff which

had a gap out of it and which rendered it entirely more dangerous for that reason.

It is shown to be the practice of good oilers to mount this frame-work and oil these bearings from the top. See testimony of Shook, the millwright, (Tr. 40-41-42-43) and Watkins (Tr. 74) and it is shown that this frame-work only had eight by six upon which dust and oil settled and it was shown that Watkins (Tr. 73) who was a well trained long experienced oiler and once an all-time oiler in this mill and had much experience in sawmills generally and in this very mill worked here on this ground floor of this sawmill and engaged in oiling under the observation of the higher-ups, that in oiling these particular bearings he mounted this frame-work and in oiling the back bearing on the south side had to come in close proximity to this broken cuff (Tr. 75).

That this practice was done under the very observation of the superintendent and that he made no objection whatever and that this was the method employed generally (Tr. 74). This same witness testified (Tr. 75-76) that it necessitated getting very close to this revolving shaft where it is otherwise shown to have a broken cuff and this witness also testified (Tr. 79) that there were two darkeys regularly employed to do oiling and that it was the custom (Tr. 79) to do this oiling from the top of this frame-work and that it was necessary to oil these bearings three or four times per day (Tr. 80-81) when he would see an oil box getting hot when the regular oiler was not there he would quit his other work and go oil it himself.

The witness, Frank Patrick, was put on the witness stand by the appellees who is an experienced millwright and helped build this very mill and showed that he had a broad experience in the operation of mills including large mills and had been instructed and was familiar with the modern safety methods and he testified (Tr. 94) that exposed set-screws on revolving shafts protruding above the collar was a very dangerous condition and that if a collar gets a gap in it all proper safety methods require that it be removed and replaced with a new one. He demonstrated (Tr. 98-99) on cross-examination that it would be dangerous to oil these two bearings on the south side of the frame-work from the ground but he thought the safer method would be to mount this frame-work and oil from the top and apparently that is just what appellee's decedent did and he further testified (Tr. 99-100) that to step over there to do it would subject the oiler to the danger of having his clothes caught by the set-screw such as did happen to appellee's decedent, and especially if it should have chanced that he had to clean out the oil box standing in this precarious situation.

Appellee also offered the testimony of Mr. Bill Morrison as an expert who had wide experience in milling operations and in safety rules and was an experienced oiler and had studied the business and claimed to know the safety standards used by careful men in that business and it was his opinion (Tr. 101-102) that where an exposed set-screw by the side of a nick broken out of a collar where people had to work around it was dangerous; and the rule among safety men for keeping set-screws shielded

or protected was to protect the men working and it has been his observation and experience that the best folks had their set-screws in set collars, they had them covered where the men could not get into them. He stated that it was the safety standard of the machinist and the mill men and it was the rule that one of these collars was used to protect men from set-screws and that when flanges get broken off to take it off and put on a new one (Tr. 105).

The appellee also offered the witness, Cooley, who was an experienced mill man with broad experience in many different plants and had been in touch with the best standards of safety and safety devices testified (Tr. 107) that when the collar was broken that protected a set-screw that the rule was to take it off and put on a new one, that the common standards of safety required set-screws to be sunken so that they would not protrude and that to leave a collar with a gap broken (Tr. 108) next to an oil box would be by the best rules considered very dangerous. He testified further that this particular set-screw where the decedent's pants leg was caught on account of this broken collar was exposed and protruded three-fourths of an inch and where this oiling had to be done was only three-fourths inches away, and it is definitely shown by the testimony of Shook (Tr. 39) that the bottom of his pants leg was caught by this very broken set-screw and collar. He testified (110-111-112) that it was dangerous to undertake to oil these bearings from the ground and as these six by eights were greasy and with dust on them there was no way to reach these bearings except more or less in a dangerous way.

This witness demonstrated that these particular bearings could not be oiled from the ground without coming in dangerous contact with this broken collar or the revolving shafts (Tr. 115-116).

The appellee offered testimony of H. L. Hathcock who showed himself to be a man of broad experience in sawmills and machinery and familiar with the very best safety methods and he testified (Tr. 119) that the broken collar in question set right up against the box that had to be oiled and that it had to be stepped over or reached over to oil the box some twenty-six inches behind on the same six by eight and that there is no other way to do it safely that it would be very dangerous to undertake it from the ground with the machinery running, and that it was hard to work around dangerous places like that for the reason that an employee could not watch his clothes and avoid such hazard and at the same time concentrate on his work (Tr. 121). He discussed the dangers of this situation again and again (Tr. 122 and 124). He again showed the danger of oiling the south bearing from the ground because of revolving pulleys and belt and chain that would endanger him.

The appellee produced witness, H. B. Reynolds, as an expert who showed a broad experience in constructing sawmills and working in sawmills of a larger type and thoroughly trained and informed on safety methods and he testified (Tr. 148-149) that it would not be practical to oil these bearings from the ground and undertook to testify that the safer method would be to mount the top just as appellee's decedent did but for some strange reason,

the trial court would not allow him to give an expert opinion and he gave his experience (Tr. 152-153) and was allowed to give his opinion that the way this was constructed that there was not any real safe way that an employee could oil these bearings. The drawing which is made an exhibit to his testimony is very valuable to this court in determining and construing much of the testimony offered for much of it refers to certain parts of this drawing and is unintelligible without the drawing before the court.

Mr. K. B. House was offered as a witness by the appellees and qualified as an expert and a man of broad experience and familiar with the best safety methods among the best operators and testified to the danger of leaving set-screws in the condition this was in and showed that these two south bearings could not be reasonably oiled from the ground and undertook to give his opinion of the practical way of mounting upon top and greasing this as decedent did but this too was objected to as an opinion and the court required the expert to conform to the standards of a layman and apparently wholly inadvertent to his qualifications as an expert but he demonstrated on further examination that there was no safe way to oil this machinery from the ground because of revolving shafts and moving chains.

The witness, Hitchcook, was recalled (Tr. 171) and testified that oilers had to clean out these oil cups to the bearings occasionally and gave the reason why.

The witness, Dodson, gave damaging testimony against the appellees and showed great partisan interest but like the superintendent he was very gravely contradicted by several witnesses, so much so, that the jury had a right to disbelieve him and no doubt did disbelieve much of his testimony.

On cross examination he was asked if he did not have a conversation with Mrs. Hollingsworth and her mother, Mrs. Potter, several days after her husband's death near the place where appellee's decedent came to his death on the outside just west of it and he admitted that Mrs. Hollingsworth and Mrs. Potter came and that he had a conversation with them, that Mrs. Hollingsworth wanted to see the broken collar and set-screw that caused the death of her husband and he admitted showing it to them and told her what a careful fine man her husband was. He was asked if he did not tell those ladies that Mr. Bishop ordered her husband to do oiling that day (Tr. 307) and that if he didn't tell these ladies that he told decedent that he wouldn't go oil that damn machinery, it was too dangerous or words to that effect and say, Ladies, excuse the expression. In this he was flatly contradicted by Mrs. Hollingsworth (Tr. 328-329). Also the testimony of Mrs. Potter (Tr. 331 and 332).

COMPARATIVE NEGLIGENCE.

The court will notice that Mississippi has adopted what is called comparative negligence which is a modification

of the common law on contributory negligence. Section 1454 Mississippi Code of 1942 Annotated, fully sets up our doctrine of comparative negligence.

Also the assumption of risk is abolished. We especially invite the court's attention to *Huff v. Barecreek Mill Company*, 77 So. 306, 116 Miss. 509; Also *Hardy v. Turner-Farber-Love Company*, 101 So. 489, 136 Miss. 355 already cited on another point; *Mississippi Power and Light Company v. Merritt*, 12 So. (2d) 521, 194 Miss. 794 from which we quote:

> "In considering this question it should be kept in mind that Sections 511 and 512 of the Code of 1930, abolish contributory negligence as a defense and made negligence and contributory negligence questions for the jury to determine, and that Section 513 of the Code of 1930 abolishes the doctrine of the assumption of risks. 'The risk that the servant assumes is the danger incident to the service which remains after the master has exercised reasonable care for the safety of the servant.' Wilbe Lbr. Co. v. Calhoun, 163 Miss. 80, 140 So. 680, 682. Evidently the work Merritt was engaged in had a good deal of complication about it. Where the work is complicated 'the mere fact that a servant may happen to know as much as the master knows about the instrumentality does not relieve the master from furnishing the servant with a safe instrumentality'. Hercules Powder Company v. Tyrone, 155 Miss. 75, 124 So. 74, 77, 475. Standard Oil Company v. Franks, 167 Miss. 282, 149 So. 798.
>
> "The fact that Merritt involuntarily threw up the hand that came in contact with the high powered

wire is no defense. Planters' Oil Mill v. Wiley, 154 Miss. 113, 122 So. 365."

THIS EMPLOYEE WAS NOT EXPECTED TO CLEAN OUT BOXES AND OIL BOXES AND AT THE SAME TIME WATCH FOR DEATH TRAPS, WHICH HIS WORK BROUGHT HIM IN CONTACT WITH.

Standard Oil Company v. Decell, 166 So. 379, 175 Miss. 251 from which we quote:

> "Regard must be had for the exigencies of the situation—the circumstances of the particular case. Circumstances may exist under which forgetfulness or inattention to a known danger may be entirely consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters or, is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. 45 C. J. 950, Section 509."

CHOOSING A DANGEROUS METHOD DOES NOT APPLY IN THIS CASE FOR SEVERAL REASONS

In the first place, all the proof tends to show that he selected the safest way available and we cite the following authorities, to-wit: *F. W. Woolworth Company v. Freeman*, 11 So. (2d) 447, 193 Miss. 838, *39 Corpus Juris*, 766 and 768; *American Jurisprudence*, Sections 282 and 283, pages 704 and 705.

This petition shows nothing new to this court but merely piles into its lap controversies that have been fully and properly settled in the Lower Courts offering nothing new and offering no violation of substantial rights.

Respectfully submitted,

JAS. A. CUNNINGHAM,
Attorneys for the Hollingsworths in Opposition to Writ of Certiorari.

State of Mississippi,
County of Prentiss.

I certify that I have this day mailed a true copy of this brief to Hannah, Simrall & Foote, attention of Mr. T. C. Hannah, and to Hon. John Holloman, to their post office address, postage prepaid.

This the .. day of ....., 1947.

J. A. CUNNINGHAM.